UNITED STATES TAX COURT
Washington, D.C. 20217

LIONEL DAVID KOLKER,	)	
	)	
Petitioner,	)	
	)	
v	)	Docket no. 567-03
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

ORDER OF DISMISSAL AND DECISION

Respondent determined deficiencies and additions to tax under sections 6651(a)(1) and 6654(a) in petitioner's 1997 and 1998 Federal incomes taxes as follows:

		Additions to tax	
Year	Deficiency	Sec. 6651(a)(1)	Sec. 6654(a)
1997	$68,379	$17,094.75	$3,658.32
1998	919	229.75	-0-

Petitioner filed a timely petition. The gist of the petition is that petitioner is not a taxpayer and is not subject to the Internal Revenue Code. Petitioner otherwise does not contest the deficiencies and additions to tax determined by respondent. Although petitioner resided in San Diego, California, at the time the petition was filed, he requested Salt Lake City, Utah, as the place of trial.

On February 5, 2003, respondent filed a Motion to Dismiss for failure to State a Claim Upon Which Relief Can Be Granted. On February 6, 2003, The Court ordered that petitioner, on or before April 4, 2003, file and amended petition setting forth with specificity each error petitioner alleges respondent made in the determinations of the deficiencies and additions to tax and the facts upon which petitioner bases each assignment of error. It was further ordered that respondent's motion was calendared for hearing in Salt Lake City, Utah, on June 9, 2003.

On February 25, 2003, petitioner submitted a document that we filed as a motion to vacate the Court's order dated February 6, 2003. As with the petition, this document contains frivolous rhetoric and does not comply with our order of February 6, 2003. That motion was carried with the case to the hearing in Salt Lake City.

When this case was called from the calendar at the Trial Session of the Court in Salt Lake City, Utah, on Mune 9, 2003, there was no appearance by or on behalf pf petitioner. Counsel for respondent appeared and presented argument in support of his motion to dismiss. Respondent also supplemented the motion to dismiss with Certificates of Assessment and Payments showing petitioner filed no returns for the taxable years 1997 and 1998.

Turning first to the deficiencies and the additions to tax, the burden of establishing that respondent's determinations are erroneous generally is on the petitioner. Petitioner has not satisfied any of the requirements of section 7491(a) to shift that burden to respondent. Furthermore, as to the additions to tax, respondent has satisfied the burden of production under section 7491(c). See Higbee v. Commissioner, 116 T.C. 438, 446-448 (2001).

Petitioner's sole argument is that he is not a taxpayer subject to the Internal Revenue Code. This argument is frivolous. United States v. Studley, 783 F.2d 934, 937 (9th Cir. 1986). Petitioner has not stated a recognizable claim, and respondent's motion will be granted.

At the hearing, the Court raised the issue whether damages should be awarded under section 6673(a). Section 6673(a) provides, inter alia:

> (a) Tax Court Proceedings.--
> (1) Procedures instituted primarily for delay, etc.--Whenever it appears to the Tax Court that--
> (A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,
> (B) the taxpayer's position in such proceeding is frivolous or groundless, or
> (C) the taxpayer unreasonably failed to pursue available administrative remedies,

the Tax Court, in it decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.

Petitioner does not dispute that he recieved the income as determined by respondent. Rather, he argues that he is not a taxpayer subject to the Internal Revenue Code. There is no question that petitioner's argument is frivolous and/or groundless. As the Court of Appeals for the Ninth Circuit (to which an appeal would lie in this case) noted:

this argument has been consistently and thoroughly rejected by every branch of the government for decades. Indeed advancement of such utterly meritless arguments is now the basis for serious sanctions imposed on civil litigants who raise them. [*United States v. Studley*, supra at 937 n.3.]

Damages under 6673 are appropriate in this case.

After due consideration, it is

ORDERED that respondent's motion to dismiss, filed February 5, 2003, is granted and this case is dismissed for petitioner's failure to state a claim upon which relief can be granted. It if further

ORDERED AND DECIDED that there are deficiencies in Federal incomes taxes and additions to tax due from petitioner for the taxable years 1997 and 1998 as follows:

		Additions to tax	
Year	Deficiency	Sec. 6651(a)(1)	Sec. 6654(a)
1997	$68,379	$17,094.75	$3,658.32
1998	919	229.75	-0-

It is further

ORDERED that petitioner shall pay damages to the United States under section 6673(a) in the amount of $10,000.

(Signed) Thomas B. Wells

Thomas B. Wells
Chief Judge

Entered: **JUL 15 2003**

FILED
May 17 2004
CATHY A. CATTERSON
CLERK US COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIONEL DAVID KOLKER,

Petitioner – Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee.

No. 03-74029

IRS no. 567-03

MEMORANDUM*

Appeal from a decision of the
United States Tax Court

Submitted May 10, 2004**

Before CANBY, KOZINSKI, and PAEZ, Circuit Judges

Lionel David Kolker appeals pro se the Tax Court's ~~order dismissing Kolker~~'s petition disputing tax deficiencies and additions asserted by the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

* This panel unanimously finds this case suitable for decision

without oral argument. *See* Fed. R. App. P. 34(a)(2).

Commissioner of Internal Revenue and directing Kolker to pay $10.000 in sanctions to the United States pursuant to Section 6673(a) of the Tax Code.

The Tax Court did not err in dismissing the petition for failure to state a claim upon which relief can be granted because the petition failed to set forth any clear and concise assignments of error or any facts demonstrating any error in the Commissioner's determinations, as required by Tax Court Rule 34(b)(4) and (5).

Kolker's only challenge to the Tax Court's sanctions award is that the erroneous dismissal of the petition renders the sanctions award moot. This contention is unavailing because the dismissal of the petition was not erroneous.

The Commissioner's motion that Kolker be sanctioned pursuant to 28 U.S.C. 1912 and Fed.R.App.P 38 for bringing a frivolous appeal is GRANTED in part. We award damages to the government in the amount of $1,500.

Kolker's motion "to admit newly discovered evidence,"** construed as a motion to supplement the record on appeal, is DENIED.

The Tax Court's order is **AFFIRMED.**

**The newly-discovered evidence Kolker want this court to consider is a transcript of a settlement hearing with Internal Revenue employees that occurred February 23, 2004, seven months after the order from which Kolker appeals was filed.

FILED
July 16 2004
CATHY A. CATTERSON
CLERK US COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIONEL DAVID KOLKER,

Petitioner – Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee.

No. 03-74029

IRS no. 567-03
Northern District of California, San Francisco

ORDER

Before CANBY, KOZINSKI, and PAEZ, Circuit Judges

Judges Kozinski, and Paez have voted to deny appellant's petition for rehearing en banc and Judge Canby so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed.R.App.P 35.

The petition for rehearing en banc is denied.

No further filings will be accepted in this closed appeal.